Filed 7/16/19 In re S.B. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re S.B., a Person Coming Under the Juvenile Court Law.	B291059 (Los Angeles County Super. Ct. No. DK13608)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. M.G., Defendant and Appellant; S.B., Appellant.	

APPEAL from an order of the Superior Court of Los Angeles County, Daniel Zeke Zeidler, Judge. Reversed with directions.

Judy Weissberg-Ortiz, under appointment by the Court of Appeal, for Defendant and Appellant M.G.

Karen Dodd, under appointment by the Court of Appeal for Appellant S.B.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Shante Sylvester, Deputy County Counsel, for Plaintiff and Respondent Los Angeles County Department of Children and Family Services.

In this dependency case (Welf. & Inst. Code, § 300 et seq.),[1] M.G. (Mother) and her daughter, S.B., appeal from the juvenile court's order terminating Mother's parental rights to S.B. (then, four years old). Mother and S.B. contend the court erred in finding the parent-child relationship exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)) did not apply to their relationship. We agree and reverse.

FACTUAL SUMMARY AND PROCEDURAL HISTORY

S.B. was born in early 2014 and lived with Mother and J.B. (Father),[2] Father's mother (S.B.'s paternal grandmother), and the paternal grandmother's husband. Sometime the following year, Mother and Father ended their relationship. Mother and S.B. moved in with Mother's new boyfriend, P.S., and P.S.'s parents.

Mother, Father, and P.S. had histories of drug use. Mother and Father regularly used methamphetamine together before they learned Mother was pregnant with S.B. During and, for some time after S.B.'s birth, Mother and Father abstained from methamphetamine. When S.B. was around one year old, they resumed their use. P.S. also used methamphetamine.

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[1] Further statutory references are to the Welfare and Institutions Code.

[2] Father is not a party to this appeal.

A. *Detention*

In early July 2015, the Los Angeles County Department of Children and Family Services (DCFS) received a telephonic referral, alleging Mother and P.S. were observed at a park "smoking marijuana out of a pipe and drinking beer with the child [S.B.] sitting next to them." The caller also reported, after they "finished smoking they allowed the child to play with the pipe and at some point the child put the pipe in her mouth."

Around a week later, a DCFS social worker contacted Mother, P.S., and S.B. at the home they shared with P.S.'s parents. Mother and P.S. denied the allegations in the referral and denied any current drug use. P.S.'s parents reported no safety concerns regarding S.B.

After the visit, the social worker learned Mother had a history of methamphetamine use and had been terminated from a residential treatment program for noncompliance when she was 15 years old (three years before the current referral). The social worker also learned that Mother had been arrested for possession of drug paraphernalia in March 2015.

In mid-August 2015, the social worker interviewed Father at the paternal grandmother's home, and he reported no safety concerns regarding S.B.

A few days later, the social worker again contacted Mother, P.S., and S.B. Mother admitted a history of marijuana use, denied a history of other drug use, and denied current drug or alcohol use. Mother and P.S. agreed to submit to an on-demand drug test. A few days later, they both tested positive for amphetamine/methamphetamine and marijuana.

The social worker scheduled a meeting with Mother and P.S. for September 4, 2015, but they did not attend. On September 16, 2015, the social worker attempted to locate them at the home of P.S.'s parents and learned that one week earlier P.S.'s mother

(Mrs. S.) had asked Mother to move out. Mrs. S. had not seen Mother, P.S., or S.B. since then and did not know their whereabouts, but believed they were staying at a motel. Mrs. S. informed the social worker that while Mother was living at her home, there were "many times" Mrs. S. watched S.B. "because nobody else was providing any care or supervision." Mother did not ask Mrs. S. to watch S.B., but Mrs. S. felt compelled to do so at times while Mother slept and S.B. wandered around the house.

In late September, DCFS applied for and received authorization from the juvenile court to remove and detain S.B., but social workers could not locate S.B. or Mother. The paternal grandmother informed the social worker that Father had moved out of her home in August 2015, and they did not know his whereabouts.

On October 1, 2015, DCFS filed a dependency petition under section 300, subdivision (b)(1), alleging Mother's and Father's drug use rendered them unable to provide regular care and supervision for S.B. and placed the child at risk of serious physical harm and damage.

Neither Mother nor Father appeared at the October 1, 2015 detention hearing. The juvenile court issued a protective custody warrant for S.B. and an arrest warrant for Mother. The court ordered S.B. detained from Mother and Father. The court also ordered monitored visitation for Mother and Father to commence once S.B. was in DCFS custody, and no contact between P.S. and S.B. The court scheduled the adjudication hearing for December 7, 2015.

B. *Jurisdiction*

Mother appeared at the December 7, 2015 hearing, and the juvenile court recalled the protective custody and arrest warrants. DCFS already had placed S.B. in foster care by this time.

In the jurisdiction/disposition report, DCFS stated Mother was visiting S.B. twice a week, and the social worker noted "the visits ha[d] gone well with no concerns." During the time S.B. was in foster care, Mother attended a medical appointment with S.B. and the foster mother, and no concerns were noted.

In an interview for the jurisdiction/disposition report, P.S. told a dependency investigator that he and Mother had never used drugs together, and the "time when [Mother] used drugs" the paternal grandmother was caring for S.B. The paternal grandmother told the dependency investigator she never suspected Mother was using drugs while Mother and S.B. were living with her.

On December 14, 2015, DCFS placed S.B. with the paternal grandmother and her husband.

On December 17, 2015, the juvenile court adjudicated the petition, sustaining the allegations about Mother's and Father's history of drug use. Mother appeared at the hearing. The court declared S.B. a dependent of the court and removed her from Mother and Father. The court ordered reunification services and monitored visitation. S.B. remained with the paternal grandmother. The court ordered Mother to participate in (1) a full drug and alcohol program with aftercare, (2) weekly, random, on-demand drug and alcohol testing, (3) a 12-step program with a sponsor, (4) a parenting class, and (5) individual counseling to address case issues.

C. *Reunification Period*

In June 2016, DCFS reported Mother was in partial compliance with her case plan and court orders. She completed a parenting education class, but was in danger of being terminated from a 26-week substance abuse program for noncompliance. Between December 23, 2015 and June 6, 2016, Mother was

scheduled for 24 random, on-demand drug and alcohol tests. She failed to show for seven of the tests, and four of the tests were positive for marijuana. The remaining 13 tests were negative for drugs and alcohol. According to the paternal grandmother, Mother's visitation with S.B. was inconsistent, as Mother often failed to show for visits or arrived late, and usually only visited once a week, although the juvenile court ordered twice weekly visitation. Mother often arrived for visits with Father, and she continued to live with P.S. She missed all but one of her scheduled meetings with the social worker. On June 14, 2016, the court continued reunification services for Mother but terminated services for Father.

In November 2016, DCFS reported Mother's compliance with her case plan and court orders had improved, as she was enrolled in a six-month substance abuse program and was "more compliant in her treatment plan." She tested negative for drugs 16 times and failed to show for tests on two occasions, once in September and once in November. She had no additional positive tests. Mother informed DCFS she was attending 12-step meetings but did not provide proof of attendance and did not yet have a sponsor. Her attendance at individual counseling was inconsistent and less frequent than ordered. She was cooperating with DCFS and had visited S.B. consistently since July, with no concerns noted by the paternal grandmother. Mother was still living with P.S., who was not participating in the case or cooperating with DCFS. On November 29, 2016, the juvenile court continued Mother's reunification services and granted her four-hour, unmonitored visits, so long as she complied with court orders. Absent written permission from DCFS, P.S. was not to have unmonitored contact with S.B.

In January 2017, DCFS reported Mother was visiting S.B. consistently two times a week. According to the paternal

grandmother, although Mother's visits were supposed to last two hours, Mother was often late returning S.B. According to S.B.'s therapist, S.B. began "acting out" (throwing tantrums and running away from the paternal grandmother) after Mother's visits were liberalized to unmonitored. S.B. told the paternal grandmother she had seen P.S. during visits with Mother, although he did not have written permission from DCFS to be present. In December 2016, the social worker made an unannounced visit to the home of S.B.'s maternal grandmother, where Mother's unmonitored visit was taking place. P.S. was not present and no concerns were noted. Mother still lived with P.S., and he had begun participating in services in an effort to obtain permission to be present during Mother's visits with S.B. Mother continued to test negative for drugs and alcohol, completed the "[g]roup component" of her substance abuse program, and "met her treatment goals" in individual counseling after attending 20 psychotherapy sessions in four and a half months. Mother's attendance at 12-step meetings was "scattered," and she needed to submit proof of attendance for completion of her substance abuse program.

At a hearing on January 24, 2017, the juvenile court granted DCFS discretion to place S.B. on an extended visit with Mother and to place the matter on calendar to request release to Mother on the condition S.B. not be left alone in the home with any male.

In March 2017, DCFS recommended the juvenile court terminate Mother's reunification services and order monitored visitation. Mother failed to provide proof of completion of her substance abuse program or attendance at the 12-step meetings. Although she consistently visited S.B., Mother routinely returned the child to the paternal grandmother 30 to 45 minutes late. She lived in the home of the maternal grandmother with P.S. and multiple unidentified tenants. Her housing situation was unstable in that the maternal grandmother stated she would not

allow Mother to remain there if P.S. did not find employment. On the positive side, since her missed test in November 2016, Mother tested negative for drugs and alcohol an additional 12 times. P.S. also was testing negative and had enrolled in individual counseling. Mother secured part-time employment as a server at a restaurant.

On March 20, 2017, the juvenile court found that mother was in compliance with her case plan and, over DCFS's objection, continued Mother's reunification services and made no change to the order for unmonitored visitation.

In June 2017, DCFS reported Mother was terminated from an aftercare program in March due to "excessive absences." The program director suggested Mother would benefit from a residential treatment program, but Mother declined. She told the social worker she enrolled in another aftercare program but did not provide DCFS with proof of enrollment. She missed a drug test in March and another in May. She gave no excuse for the missed test in March but stated she missed the test in May because of her work schedule. Due to Mother's noncompliance with court orders, DCFS restricted her visitation to monitored (twice weekly, two-hour visits). The paternal grandmother noted no concerns with the monitored visits. DCFS again recommended termination of reunification services, but the juvenile court continued Mother's services at a June 22, 2017 hearing.

In August 2017, DCFS reported Mother became a manager at the restaurant where she worked and was subletting a studio apartment where she lived alone. DCFS found the apartment "to be safe and appropriate" for a child to reside. For four months, Mother had been participating in a new aftercare program, but she had not yet completed it. The aftercare counselor told the social worker Mother attended six 12-step meetings in four months. Mother represented she attended 12-step meetings weekly, but she did not

provide DCFS with proof of attendance. In mid-August, DCFS liberalized Mother's visitation to unmonitored because she was in compliance with her aftercare program. DCFS continued to recommend the juvenile court terminate Mother's reunification services and identify adoption as the permanent plan for S.B. DCFS reported S.B. was "thriving" in the paternal grandmother's home and attending a Montessori School program.

In September 2017, DCFS informed the juvenile court that Mother completed her aftercare program on September 2, 2017. At a hearing on September 13, 2017, the court granted Mother overnight visits with S.B. so long as she was in compliance with her case plan.

In November 2017, DCFS reported concerns regarding Mother's unmonitored, overnight visitation. The paternal grandmother stated Mother picked up both S.B. and Father for an overnight visit, although Father was not approved for visitation in Mother's home. Father told the paternal grandmother "that he will spend overnights with Mother and [S.B.]" in Mother's home. According to the paternal grandmother, Mother planned to have Father move into her home. The paternal grandmother also reported seeing P.S. during Mother's unmonitored visits.[3] DCFS recommended the juvenile court restrict Mother's visitation to monitored and terminate her reunification services.

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[3] Also in November 2017, DCFS recommended the juvenile court remove S.B. from the paternal grandmother's home because the social worker suspected she was allowing Father to have unrestricted access to S.B. in the home. After DCFS conducted an investigation, the juvenile court and DCFS found the paternal grandmother's statements credible that she had not allowed Father to be in the home with S.B. other than during his approved visitation schedule.

At a hearing on November 9, 2017, the juvenile court restricted Mother's visitation to monitored. In deciding whether to terminate reunification services, the court heard testimony from Mother and the paternal grandmother. At the continued hearing on November 15, 2017, the court found Mother to be in partial compliance with her case plan and terminated her reunification services. The court set the section 366.26 permanency plan hearing.

D. *Post-Reunification Visitation*

Between the termination of reunification services and the permanency plan hearing, Mother and S.B. had two monitored visits per week: a one hour visit and a one and one-half hour visit. DCFS monitors noted their observations about the visits in a delivered service log.

According to the delivered service log, S.B. was "always happy and excited" about seeing Mother, and would tell the social worker, "I can[']t wait to see my mommy," and "my mom will be very proud of me, I drew my letters 1 thr[ough] 10." S.B. initiated their hugs when they met, and would tell Mother she missed her. The DCFS monitor's notes are replete with reports of S.B. and Mother telling one another that they love each other. Regarding a visit in March 2018, the monitor reported that S.B. "is very affectionate with [M]other by hugging her, kissing her, telling her she wants to come live with her, telling her how much she loves her and [M]other is the same way." At the beginning of a visit in March, S.B. ran to Mother, hugged her, and said, "[M]ommy I am going to come stay with you," and asked, "Can I come stay with you mommy?" In May, S.B. painted a picture of hearts and butterflies, and told Mother to write on the picture the words, "I want to be with you all the time." S.B. was often saddened, sometimes to the point of tears, by having to separate from Mother at the end of visits. She would tell

Mother, "I don't want you to go," and would ask to stay longer and to go home with Mother.

Mother prepared and brought food for S.B. Although S.B. often wanted to play or open a gift, Mother insisted that S.B. finish eating first, while they talked about school and S.B.'s friends. Mother accompanied S.B. to the bathroom and helped her with washing. Mother cut S.B.'s fingernails, comforted her and checked for a fever when she appeared unwell, told her to wear a jacket when it is cold, asked about bruises she had on her shins, and addressed and corrected inappropriate behavior. Mother read to S.B. and let S.B. pretend to read to her while cuddling on Mother's lap. During an April 2018 visit, S.B. asked Mother "to carry her like a baby." Mother held S.B. on her lap and told S.B. "stories about when she was a baby." At the end of visits, Mother helped S.B. into her car seat.

During visits, Mother demonstrated the skills she acquired from her parenting course and counseling. For example, during a visit in April 2018, S.B. pulled on Mother's shirt, and Mother told her not to do that. S.B. became angry and threw a doll that Mother had brought to the visit. Mother told S.B. not to throw the toys. S.B. then pretended to cry. Mother gave her some time to calm down, and then asked S.B. what was the matter. S.B. did not respond and eventually went back to the table as if nothing happened. Mother, however, did not let it go, and again asked S.B. what was the matter. S.B. said, "I don't like you, you are disgusting!" S.B. then asked for the toy she had thrown, and Mother told her, "[N]o, you need to talk to me." S.B. then started crying again, and said she just wanted to play by herself. Mother ignored S.B.'s behavior until S.B. calmed down. Mother then asked S.B. if she had upset her. S.B. said, yes, and that she wanted to play by herself, which Mother let her do. When the DCFS monitor informed them there were about 30 minutes left for the visit, S.B.

said she did not want to leave Mother. Eventually, Mother asked S.B. if she wanted to read a story; she did, and they read a book together. S.B. then sat on Mother's lap and finished eating. The monitor concluded: S.B. "was smiling and laughing and didn[']t want to go when it was time [to leave]. [Mother] walked [S.B.] to the car and helped put her into her car seat."

E. *Mother's Section 388 Petition*

On March 29, 2018, Mother filed a request to change court order pursuant to section 388 (the section 388 petition), requesting the juvenile court return S.B. to her care and terminate jurisdiction or, in the alternative, vacate the order setting the permanency plan hearing, reinstate reunification services, and allow longer, unmonitored visits. The changed conditions specified in Mother's petition include her sobriety and clean drug tests, her maintenance of a full-time job and a safe home, and the fulfillment of her case plan, including completion of substance abuse and parenting programs, attendance at Narcotics Anonymous (NA) and Alcoholics Anonymous (AA) meetings, and individual counseling. The requested relief would benefit S.B., Mother asserted, because it would allow for the possibility of being reunited with, and parented by, her mother, with whom she shares a close and loving bond. S.B. would also benefit from the parenting skills Mother gained through her programs and counselling.

In support of the petition, Mother submitted her declaration stating that she has "complied with the court's orders and the case plan," completed an after care drug program, "no longer us[es] drugs or alcohol, and [has] not used for a long time," continues to voluntarily drug test and maintain sobriety, has held "a full time job for over a year and [a half]," has "a clean and stable home," and no longer lives with P.S.

Through her substance abuse program and counseling, Mother learned "how to properly cope without self medicating," and about the role that "drugs and alcohol play in a child's life and how it affects their future." As a result of counseling, she has made S.B. her "priority above all else." Mother further stated that she has completed her parenting program and "learned how to understand a child's needs," "how to always be a parent for [S.B.], and to never allow drugs around [her] child or be under the influence again." She now understands "how important the beginning stages of a child's life are to developing good relationships, education, healthy habits, confidence and love," and "how a parent's instability can affect a child." Although the court restricted her visits with S.B., she stated she "did not give up and [has] continued to test clean and work, and visit at every occasion" "to demonstrate [her] continuing responsibility and commitment to raising" S.B.

Mother also provided evidence of stable employment at a restaurant, where she began as a cashier and was later promoted to shift manager. The restaurant's general manager provided a letter stating that Mother is "very dependable," has "good moral conduct," and is a "great leader and a good example to her co[-]workers."

The petition is further supported by a letter evidencing Mother's completion of an alcohol and drug awareness program, and evidence of 12 voluntary drug tests since the termination of services, as well as AA meeting attendance records.

The same day Mother filed her section 388 petition, the court denied it without a hearing as to all requested relief except the request to allow unmonitored visits with S.B. A hearing on that part of the section 388 petition was set for April 23, 2018.

In its response to the section 388 petition, DCFS quoted its detention report and status reports filed prior to the termination of services. It also filed a last minute information report with an

update as to the assessment of the paternal grandparents as prospective adoptive parents and the conversion of the case to "Resource Family Assessment" status in January 2018. DCFS did not submit any evidence contradicting the evidence Mother submitted in support of her petition.

On the date of the hearing on Mother's section 388 petition for liberalized visitation, Mother filed a motion for the appointment of an expert to evaluate the parent-child bond between Mother and S.B. At the conclusion of the hearing, the court denied the section 388 petition and the motion for a bonding study.

F. *Termination of Parental Rights*

At the time of the permanency plan hearing, S.B. was nearly 4 years 5 months old and had lived with the paternal grandmother and her husband for two and a half years. S.B. did not have any developmental or behavioral issues and did not require therapeutic services. The paternal grandmother and her husband were meeting S.B.'s needs and were eager to adopt her. According to DCFS's section 366.26 report filed in March 2018, a social worker had provided them with information concerning the rights and responsibilities of adoptive parents and legal guardians, and were willing to accept the responsibilities of adoption.

Mother was the only testifying witness at the June 25, 2018 permanency plan hearing. She stated that she and S.B. have visits twice each week. Mother will bring food and kindergarten-level educational materials. At the beginning of visits, S.B. runs to her, hugs her, and tells her, "Mommy, I missed you." During the visits, S.B. will "randomly" tell Mother she loves her, misses her, and "can't wait to see [her]." They will eat the food Mother brought to the visits, and S.B. will read to her. At times, Mother will need to tell S.B. that she cannot have her way; for example, when S.B. wants a cookie or wants to play before eating. If S.B. gets upset,

Mother will talk with her about it. If S.B. is upset about having to eat before playing, for example, Mother tells her that they "will have time for everything," and if they "eat now, [they] can play more later." At the end of visits, S.B. will tell the DCFS monitor that "she doesn't want to go home," hugs Mother, and asks to stay a while longer.

Mother's weekly random drug tests have had no positive results in the six months preceding the hearing. She regularly attends NA meetings and participates in counseling. She has not been in a relationship with Father since 2014, but admitted that she had allowed him to have contact with S.B. In the future, if S.B. was in her care and Father showed up, she would "tell him he can't be there," call the paternal grandmother, and "call the cops or something."

The court also considered the delivered service log and the evidence Mother submitted in support of her section 388 petition.

Mother's counsel and S.B.'s counsel argued the court should not terminate parental rights because the parent-child relationship exception (§ 366.26, subd. (c)(1)(B)(i)) applied to the relationship between Mother and S.B. Father's counsel also objected to termination of parental rights. DCFS argued in favor of termination of parental rights.

The juvenile court found S.B. was adoptable and no exception to termination of parental rights applied. The court explained: "The mother has shown regular and consistent visitation and contact. And the fact that she had the child for the first two years, combined with having at some point gotten to the level of unmonitored visits and continuing to maintain twice weekly monitored visits with the level of activities being discussed, it does appear that that ongoing regular and consistent visitation and contact has conferred a parental role and relationship to some extent. But it has definitely not been shown by Mother's

counsel and minor's counsel that . . . the extent to which it has created a parental role and relationship outweighs the benefits of permanence in adoption for this child under this fact pattern and circumstances." Accordingly, the court terminated Mother's and Father's parental rights and identified adoption as the permanent plan for S.B.

Mother and S.B. appealed from the order terminating parental rights and from the orders denying her section 388 petition.

DISCUSSION

Mother and S.B. contend the juvenile court erred in finding the parent-child relationship exception to terminating parental rights did not apply. We agree.

At a section 366.26 hearing the court is charged with determining a permanent plan of care for the child. If a child is likely to be adopted, adoption is the preferred plan. (*In re Casey D.* (1999) 70 Cal.App.4th 38, 50.) "The Legislature has provided an exception to the general rule of adoption: the court should not order a permanent plan of adoption when termination of parental rights would be detrimental to the child because '[t]he parents . . . have maintained regular visitation and contact with the [child] and the [child] would benefit from continuing the relationship.' " (*Ibid.*) The parent challenging the termination of parental rights based on the parent-child relationship exception has the burden of proving that the exception applies. (*In re C.B.* (2010) 190 Cal.App.4th 102, 122; *In re Zachary G.* (1999) 77 Cal.App.4th 799, 809.)

The "relationship" to which the statutory exception refers is a "*parental* relationship . . . , not merely a friendly or familiar one." (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350.) A parental relationship, however, does not require that the parent be the child's caretaker during the dependency case (*In re Brandon C.*

(1999) 71 Cal.App.4th 1530, 1538), or even that the child has "a 'primary attachment' to the parent" (*In re S.B.* (2008) 164 Cal.App.4th 289, 299).

Here, the court found that Mother had maintained regular visitation with S.B., and that Mother had "a parental role and relationship [with S.B.] to some extent." These findings are not disputed on appeal. The remaining question for the trial court was whether Mother's relationship with S.B. "promote[d] the well-being of [S.B.] to such a degree as to outweigh the well-being [she] would gain in a permanent home with new, adoptive parents." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The juvenile court makes this determination by balancing " 'the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.' " (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.)

The court must balance these competing interests on a case-by-case basis and take into account many variables, including the age of the child, the portion of the child's life spent in the parent's custody, the positive or negative effect of the interaction between the parent and the child, and the child's particular needs. (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 576; *In re Helen W.* (2007) 150 Cal.App.4th 71, 81.) These factors are not exclusive, and courts have considered the parent's progress on the issues that necessitated the dependency proceedings (*In re G.B.* (2014) 227 Cal.App.4th 1147, 1166; *In re Jasmine D.*, *supra*, 78 Cal.App.4th at p. 1352), evidence of the parent's ongoing drug use (*In re Noah G.* (2016) 247 Cal.App.4th 1292, 1302), the parent's ability to improve parenting skills (*In re K.P.* (2012)

203 Cal.App.4th 614, 622), the parent's effort to regain custody (*In re Amber M.* (2002) 103 Cal.App.4th 681, 690), whether the child looked forward to visits with the parent (*In re Bailey J.* (2010) 189 Cal.App.4th 1308, 1316), the conduct of parent and child during visits (*In re S.B.*, *supra*, 164 Cal.App.4th at p. 298), and the child's behavior when separating from the parent at the end of visits (*ibid.*; *In re Marcelo B.* (2012) 209 Cal.App.4th 635, 644; *In re J.C.* (2014) 226 Cal.App.4th 503, 533).

When, as here, issues regarding the regularity of Mother's visitation and the existence of a parental relationship are not disputed, and the issue on appeal is the court's determination that "the benefit to the child derived from preserving parental rights is not sufficiently compelling to outweigh the benefit achieved by the permanency of adoption, we review that determination for abuse of discretion." (*In re Breanna S.* (2017) 8 Cal.App.5th 636, 647; *In re K.P.*, *supra*, 203 Cal.App.4th at p. 622; *In re Bailey J.*, *supra*, 189 Cal.App.4th at p. 1315.)

At the time of the permanency plan hearing, S.B. was about four and a half years old. During the first two years of her life she lived with Mother, who was her primary caretaker. During the dependency proceeding, she lived with her paternal grandmother and her husband, who provided S.B.'s day-to-day care and met her needs. According to DCFS, S.B. was thriving in their care and had no developmental or behavioral issues.

Mother was the sole testifying witness at the hearing. The court also considered Mother's section 388 petition and the delivered service log. DCFS offered no facts contradicting Mother's evidence that she had maintained her sobriety and "complied with the court's orders and the case plan," including completing substance abuse and after care programs. She continued to test randomly once each week and had no positive tests in the six months preceding the hearing. She achieved stability in her life

by maintaining employment, securing a residence that was safe for S.B. and acceptable to DCFS, and ending her relationship with P.S.

Mother's testimony and the visitation monitor's reports establish that, despite the limits placed on their visits, Mother maintained a strong parental bond with S.B. Mother never missed a scheduled visit and was late only once. Mother not only brought food for S.B., read to her, and played with her, but helped S.B. with her personal needs, such as washing and cutting her fingernails, and showed concern for her health and well-being by checking her for a fever, asking about bruises, and admonishing her to dress warmly. She made sure that S.B. finished eating before playing, and dealt effectively with inappropriate behavior. DCFS visitation monitors described Mother variously as "very attentive," "interactive and positive," "affectionate," "encourag[ing]," "very appropriate," "very proper," "constantly engaged," and "loving."

S.B. looked forward to the visits and to showing Mother her accomplishments, which Mother praised and encouraged. S.B. initiated hugs and kisses, and Mother reciprocated. S.B. expressed her desire to extend visits and to live with Mother, and was often sad when visits ended.

Significantly, Mother deftly applied the skills she gained from her parenting course and counseling. In the shirt-pulling incident described above (see Factual Summary part D *ante*, p. 12), Mother defused a toy-throwing tantrum and turned the situation into a positive experience by remaining calm and allowing S.B. to be by herself while she was upset. On another occasion, S.B. began to jump on a couch, and Mother told her to stop. S.B. did not want to stop, but Mother "was able to distract her by saying 'jump in my arms,' " and [S.B.] did. It is clear from these and other reports that S.B.'s visits were not merely "playdates . . . with a loving adult" (*In re Bailey J.*, *supra*, 189 Cal.App.4th at p. 1316), but successful

parenting experiences that revealed and strengthened the parent-child bond between them.

Although courts have set "the hurdle high" for parents attempting to come within the parent-child relationship exception, it is not "an impossible standard." (*In re Casey D.*, *supra*, 70 Cal.App.4th at p. 51; see Seiser & Kumli, Cal. Juvenile Courts Practice and Procedure (2019) Permanency Planning Procedures, § 2.171[5][b][ii][D], pp. 2-638–2-641.) Based on the uncontradicted evidence, Mother has satisfied that standard here. The record reveals a strong and close parent-child bond between Mother and S.B., the severing of which would deprive S.B. "of a substantial, positive emotional attachment such that the child would be greatly harmed." (*In re Autumn H.*, *supra*, 27 Cal.App.4th at p. 575; see *In re S.B.*, *supra*, 164 Cal.App.4th at pp. 300-301 [parent-child relationship exception applied where the "only reasonable inference" from the record was that child "would be greatly harmed by the loss of her significant, positive relationship with" her father]; *In re Amber M.*, *supra*, 103 Cal.App.4th at p. 690 [parent-child relationship exception applied where the mother "visited as often as she was allowed and acted in a loving, parental role with the children" and "did virtually all that was asked of her to regain custody"].) The trial court, therefore, erred when it found the parent-child relationship exception did not apply.[4]

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[4] At the permanency plan hearing, the court ordered that further visits between Mother and S.B. shall be at the discretion of the paternal grandmother. In light of our opinion, discretion to deny such visits can no longer be justified. Accordingly, we shall direct that the court order visitation between Mother and S.B. on terms that shall permit the maintenance of their parent-child relationship. Furthermore, we find it unnecessary to reach the issues raised by the court's denial of Mother's section 388 petition and note that Mother may file a new section 388 petition.

DISPOSITION

The orders made at the permanency plan hearing held pursuant to section 366.26 are reversed. The court is directed to set a new permanency plan hearing for S.B. to determine a permanent plan that does not include the termination of Mother's parental rights. Pending that hearing, the court is further directed to enter an order forthwith establishing visitation between Mother and S.B. on terms that will allow Mother and S.B. to maintain their parent-child relationship.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

I concur.

WEINGART, J.*

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

CHANEY, J., dissenting:

After family preservation fails and a juvenile court concludes that the existence of a beneficial parental relationship does not present a compelling reason to forgo adoption, appellate review of that decision involves a multifold inquiry. We must determine whether the parent has visited the child regularly, whether a beneficial relationship between them exists, and whether that relationship outweighs the child's need for a permanent placement. Even if we conclude that all of these questions militate in favor of retaining parental rights, we must finally examine whether the juvenile court abused its discretion in concluding otherwise.

The majority undertakes only the first and second parts of the inquiry, and its conclusion rests on a basic misconception about what constitutes a compelling reason to forgo adoption.

A. When Family Preservation Fails

When a child is removed from a parent's custody the parent is entitled to 12 months of reunification services, with the possibility of six additional months. (Welf. & Inst. Code, § 361.5.)[1] There is a statutory presumption that the child will be returned to parental custody during reunification, and the state must prove at up to four hearings—the dispositional- and 6-, 12- and 18-month review hearings—that removal was necessary and that reunification services were provided but return would nevertheless be detrimental to the child. (§§ 366.21, subds. (e) & (f), 366.22, subd. (a).)

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[1] Further statutory references are to the Welfare and Institutions Code.

During this process the parent has the assistance of a social worker and an attorney and the continuing right to petition for modification of the juvenile court's orders. (§ 388.)

If the state proves that after all of this, the child may not safely be returned to the parent, "the focus shifts to the needs of the child for permanency and stability" (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309), in service of which the juvenile court must develop a permanent plan that will protect the child's " 'compelling right' " to a placement " 'that allows the caretaker to make a full emotional commitment to the child.' " (*In re Celine R.* (2003) 31 Cal.4th 45, 52-53 (*Celine R.*).) Here, it is undisputed that family preservation has failed.

As a matter of law, it is time for S.B. to move on.

B. Whether an Exception to Adoption Applies

After family preservation has failed "[t]he court has four choices at the permanency planning hearing. In order of preference the choices are: (1) terminate parental rights and order that the child be placed for adoption (the choice made here); (2) identify adoption as the permanent placement goal and require efforts to locate an appropriate adoptive family; (3) appoint a legal guardian; or (4) order long-term foster care." (*Celine R.*, *supra*, 31 Cal.4th at p. 53.)

" 'Adoption is the Legislature's first choice because it gives the child the best chance at [a full] emotional commitment from a responsible caretaker.' [Citation.] 'Guardianship, while a more stable placement than foster care, is not irrevocable and thus falls short of the secure and permanent future the Legislature had in mind for the dependent child.' " (*Celine R.*, *supra*, 31 Cal.4th at p. 53.) Continued foster care is the least stable option. (*Ibid.*)

If the court finds "that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption." (§ 366.26, subd. (c)(1).)

At this stage " 'it becomes inimical to the interests of the minor to heavily burden efforts to place the child in a permanent alternative home,' " and "the court must choose adoption where possible." (*Celine R.*, *supra*, 31 Cal.4th at p. 53.) However, "in *exceptional circumstances*" the court may order a permanent plan other than adoption if a specified circumstance "provides a compelling reason for finding that termination of parental rights would be detrimental to the child." (*Ibid.*)

Subdivision (c)(1)(B)(i) of section 366.26 sets forth the circumstance at issue here. It permits the court to forego termination of parental rights if it "finds a compelling reason for determining that termination would be detrimental to the child due to [the parent having] maintained regular visitation and contact with the child and the child would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(B)(i).)

A court's determination that the circumstance does not pertain " 'may be based on any or all of the component determinations—[(1)] whether the parent has maintained regular visitation, [(2)] whether a beneficial parental relationship exists, and [(3)] whether the existence of that relationship constitutes "a compelling reason for determining that termination would be detrimental to the child." ' " (*In re Caden C.* (2019) 34 Cal.App.5th 87, 104 (*Caden C.*).)

Here, the majority aptly lauds Mother's regular visitation and newfound parental skills, and the loving, beneficial parental relationship between her and S.B. I have no quarrel with this. But the majority stops short of explaining why regular visitation

and a beneficial parental relationship presents a compelling reason to forgo adoption.

As discussed in *Caden C.*, the next part of the analysis asks whether " 'the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents.' " (*Caden C.*, *supra*, 34 Cal.App.5th at p. 105.) "In evaluating this issue, the court must balance 'the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated.' " (*Ibid.*)

This theme of balancing the beneficial parental relationship against the child's security is implicit in the parental exception itself and runs explicitly throughout the case law. Subdivision (c)(1)(B)(i) of section 366.26 prescribes an exception to adoption when the child "would benefit" from continuing the parental relationship.

The case law uniformly explains that the benefit at issue concerns the child's overall well-being, not the immediate benefit derived from the relationship itself.

The case law does so by directing that the immediate relationship benefit be weighed against the loss of security and stability the child will experience in an impermanent placing. (See, e.g., *In re Derek W.* (1999) 73 Cal.App.4th 823, 827 [the juvenile " 'court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the

security and the sense of belonging a new family would confer' "]; *In re Breanna S.* (2017) 8 Cal.App.5th 636, 647 (*Breanna S.*) ["the benefit to the child derived from preserving parental rights [must be] sufficiently compelling to outweigh the benefit achieved by the permanency of adoption"]; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*) ["benefit" means that "continuing the [parent/child] relationship" must "promote[ ] the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents"].)

Here, the majority rightly extols the quality of Mother's and S.B.'s newfound relationship. But at this stage the law subsumes S.B.'s need for a relationship with Mother to her need for permanency, stability, or a placement " 'that allows the *caretaker* to make a full emotional commitment to the child.' " (*Celine R.*, *supra*, 31 Cal.4th at p. 53, italics added.)

Mother is no longer the caretaker.

Relying on *Autumn H.*, the majority grounds its conclusion on the fact that the relationship between Mother and S.B. is so beneficial that if the court terminated Mother's parental rights S.B. would—expressly in *Autumn H.*'s words—be " 'greatly harmed.' " (Maj. opn. *ante*, p. 20.) But that is not what *Autumn H.* means by "greatly harmed."

Autumn H. stated: "In the context of the dependency scheme prescribed by the Legislature, we interpret the 'benefit from continuing the [parent/child] relationship' exception to mean the relationship promotes the well-being of the child *to such a degree as to outweigh the well-being the child would gain in a permanent home* with new, adoptive parents. In other words, the court balances the strength and quality of the natural

parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Autumn H.*, *supra*, 27 Cal.App.4th at p. 575, italics added.)

To determine whether a child would be "greatly harmed" by severing the parent/child relationship it is not enough that there be a substantial, positive, emotional attachment; the attachment must outweigh the security and sense of belonging that a permanent family would confer. Otherwise we need have no talk of balancing or weighing. (See *Caden C.*, *supra*, 34 Cal.App.5th at p. 106 [the question " ' "calls for the juvenile court to determine the importance of the relationship in terms of the detrimental impact that its severance can be expected to have on the child *and to weigh that* against the benefit to the child of adoption" ' "], italics omitted & added.) Only if the beneficial relationship outweighs the well-being the child would gain in a permanent home can we say the child would be greatly harmed by terminating the relationship and a compelling reason exists to forgo adoption.

Here, by the time of the permanency hearing Mother was enjoying two monitored visits with S.B. per week: a one-hour visit and another one-and-a-half hour visit, for a total of two and a half hours. S.B. was nearly four and a half years old and had lived with the paternal grandmother and her husband (the prospective adoptive parents) for two and a half years, more than half her life. They provided her day-to-day care and met her

needs, and she was thriving in their care, having no developmental or behavioral issues.

At this late stage, only in "*exceptional circumstances*" will a substantial, positive, parental attachment outweigh a child's security and the sense of belonging to a permanent family. (*Celine R.*, *supra*, 31 Cal.4th at p. 53.) Those circumstances are not present here, where two years into the reunification process Mother's relationship with S.B. occupies only two and a half monitored hours a week.

S.B.'s true family life occupies the other 165 and a half (unmonitored) hours.

C. Whether the Juvenile Court Abused its Discretion

Even if the majority was correct that existence of the relationship between Mother and S.B. presents a compelling reason to forgo adoption, there is a final question: Whether the juvenile court abused its discretion in finding otherwise.

"[A] juvenile court's determination whether [a beneficial] relationship provides a compelling justification for forgoing adoption . . . is 'a "quintessentially" discretionary decision, which calls for the juvenile court to determine the *importance* of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption.' [Citations.] Intrinsic to a balancing of these interests is the exercise of the court's discretion, properly reviewable for abuse." (*Caden C.*, *supra*, 34 Cal.App.5th at p. 106.)

Although the majority disagrees with the juvenile court's finding it fails to explain how the finding was so unwarranted that no reasonable judge could have made it.

Of course the court's finding, even if wrong, was at least reasonable. When a very young child has spent more than half her life with a prospectively permanent family, and visits the parent who once endangered her only twice a week for two and a half hours in a monitored setting, a reasonable judge could conclude the parental relationship does not outweigh the family one.

For these reasons, I respectfully dissent.

CHANEY, J.